STATE OF MICHIGAN

COURT OF APPEALS

DAROLD F. MCCALLA, aka DONALD F. MCCALLA, Successor Trustee of the FRANK E. MCCALLA TRUST,

Plaintiff/ Third-Party Defendant - Appellee,

v

TIMOTHY E. BROGAN and MICHAEL J. BROGAN,

Defendants/ Third- Party Plaintiffs - Appellants.

UNPUBLISHED
August 8, 2006

No. 268045
Ingham Circuit Court
LC No. 04-000007-CK

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's grant of summary disposition in favor of plaintiff in his claim for breach of contract. We affirm.

Defendants first argue that the trial court erred in finding that their affirmative defense of accord and satisfaction fails as a matter of law. We disagree.

We review a trial court's ruling on a motion for summary disposition de novo. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). The existence of an accord and satisfaction may be decided as a question of law if the facts of the case are undisputed and not open to opposing inferences. *Urben v Pub Bank*, 365 Mich 279, 286; 112 NW2d 444 (1961). Here, although defendants dispute the legal implications of the facts, the relevant facts are not in dispute. Therefore, the case presents a question of law, which we review de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998).

"The first requirement of an accord and satisfaction is a good-faith tender to the claimant as full satisfaction of the claim." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 76; 711 NW2d 340 (2006), citing MCL 440.3311(1)(*i*). "The second requirement of an accord and satisfaction involving a negotiable instrument is that the claim be unliquidated or subject to a bona fide dispute." *Id*., citing MCL 440.3311(1)(*ii*). Thus, an accord and satisfaction defense is relevant only where a good-faith dispute exists with regard to an unliquidated amount owing under a contract. *Id*. at 71.

Here, defendants argue that, "because of the recent lawsuit, there is a dispute about the amount of money that's claimed to be owed." However, the claim must be in dispute at the time of the alleged accord. *Id*. at 77 n 10. Defendants' subsequent refusal to pay the amount due on the contract between Frank McCalla and defendants, entitled "Letter Agreement," does not mean that the debt was subject to a good faith dispute at the time they claim plaintiff agreed to accept $200,000 in full satisfaction of the debt.

Defendants also argue that "[t]he unliquidated amount of the claim of Plaintiff is approximately $75,000." Defendants, however, apparently misunderstand the meaning of the term "liquidated." "A liquidated claim is one which can be determined with exactness from the agreement between the parties, or by arithmetical process, or by the application of definite rules of law." *Faith Reformed Church of Traverse City v Thompson*, 248 Mich App 487, 493; 639 NW2d 831 (2001), citing 1 Am Jur 2d, Accord and Satisfaction, § 7, p 474. Here, the Letter Agreement is specific as to amount. It provided that defendants would subordinate their return in the corporation to guarantee a full return to plaintiff of $150,000 plus 7.5 percent interest from the date of plaintiff's investment to the final date of repayment. Because the amount due on the Letter Agreement is calculable with exactness according to its clearly stated interest rate, it is a liquidated debt.

Michigan courts have long recognized that "'part payment of a past-due, liquidated, and undisputed claim, even though accepted in full satisfaction thereof, does not operate to discharge the debt, but constitutes a payment *pro tanto* only.'" *Monroe v Bixby*, 330 Mich 353, 357; 47 NW2d 643, 645 (1951), quoting *Aston v Elkow*, 279 Mich 232, 234; 271 NW 742 (1937). The trial court, therefore, correctly held that defendants' affirmative defense of accord and satisfaction fails as a matter of law.

Defendants next argue that the trial court erred in not considering parol evidence of a subsequent agreement by the parties to modify the terms of the Letter Agreement. We disagree.

"'[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.'" *Hamade v Sunoco Inc (R&M)*, ___ Mich App ___; ___ NW2d ___ (2006), quoting *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998). However, parol evidence of a subsequent agreement varying or abrogating a written contract is admissible. *Marx v King*, 162 Mich 258, 263; 127 NW 341 (1910).

Defendants argue that they should be allowed to introduce parol evidence showing that plaintiff altered the terms of the Letter Agreement by agreeing accept $200,000 as payment in full on the Letter Agreement. Because this is evidence of a subsequent agreement, it does not violate the parol evidence rule. *Marx*, *supra*. Its admission, however, would have no effect on the outcome of the case because it would apparently only be offered to establish the defense of accord and satisfaction, which, as we previously discussed, the trial court properly held barred as a matter of law because the debt was liquidated and not subject to good-faith dispute.

If, on the other hand, defendants are seeking to introduce parol evidence to support their counterclaim that plaintiff fraudulently induced them to sell the golf course in reliance on his representation that he would accept less than the amount due on the Letter Agreement,

defendants have abandoned their counterclaim on appeal by not identifying it in their statement of questions presented, MCR 7.212(C)(5), and by their failure to adequately brief it, *Lentz v Lentz*, ___ Mich App ___, ___ n 7; ___ NW2d ___ (2006).

Next, defendants argue that they are entitled to remand because plaintiff's motion for summary disposition did not specify on what grounds it was brought or the relief requested, defendants should have been given an additional period for discovery, and the trial court's written opinion was inconsistent with what it had previously stated on the record. We disagree.

We find no merit to defendants' argument that plaintiff's motion for summary disposition failed to specify the grounds on which it was based or to request dismissal of defendants' counter claim. Plaintiff's motion for summary disposition clearly requested a default judgment against defendants for their failure to appear for deposition, asserted that defendants' defense of accord and satisfaction was defective as a matter of law, and requested that defendants' third party claim be dismissed with prejudice in the prayer for relief.

With regard to defendants' claim that the trial court erred in denying their motion for reconsideration because they should have been given the opportunity to support their affirmative defense and their third-party fraud claim through deposition testimony, we find the trial court did not abuse its discretion. The trial court, denied defendants' request for further discovery, made for the first time in defendants' motion for reconsideration, because defendants failed to make themselves available for deposition during the court-ordered discovery period and because they intentionally ignored a court order that they make themselves available for deposition on or before October 18, 2004.

This Court reviews a circuit court's decision on a motion for reconsideration for an abuse of discretion, *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003), as well as a trial court's imposition of discovery sanctions, *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999), and a trial court's decision to decline to entertain motions filed after the deadline set forth in its scheduling order, *People v Grove*, 455 Mich 439, 470; 566 NW2d 547 (1997). MCR 2.401(B)(2)(a)(iii) specifically grants the trial court the power to limit the period for the completion of discovery through a scheduling order when it "concludes that such an order would facilitate the progress of the case." Additionally, MCR 2.401 implicitly permits trial courts to decline to entertain motions beyond the deadlines established in scheduling orders. *Kemerko Clawson LLC v RXIV Inc*, 269 Mich App 347, 350; 711 NW2d 801 (2005), citing *Grove, supra* at 469.

Here, the deadline for discovery had long passed prior to defendants' motion for reconsideration, in which they stated, "It should also be noted that had discovery occurred on this case, the facts would may [sic] have changed and this Court may have reached a different conclusion." Defendants had ample opportunity to participate in depositions, but they repeatedly failed to appear for scheduled depositions despite the trial court's order that they make themselves available on or before October 18, 2004; therefore, defendants had no evidence to support either their affirmative defense or their third party claim. In opposition to plaintiff's motion for summary disposition, however, defendants were not permitted to "rest upon mere allegations or denials, but [were required to] proffer evidence of specific facts showing that there is a genuine issue for trial." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). Thus, the trial court's initial grant summary disposition in favor of plaintiff

was proper because defendants failed to proffer any evidence showing a genuine issue for trial at the time of the motion. Given defendants' blatant defiance of the trial court's discovery orders,[1] the trial court did not abuse its discretion in refusing to reopen discovery on a motion for reconsideration to allow defendants to take their own depositions.

With regard to defendants' argument that the trial court contradicted itself between what it said on the record and what it stated in its opinion, we find that this claim is based on the trial court's statements taken out of context and, even if correct, would not constitute grounds for reversal.

At the motion hearing, the trial court stated that it would not grant summary disposition for noncompliance because plaintiff had never even asked for orders compelling discovery. Plaintiff's counsel then made clear that he was not arguing for a default judgment as a discovery sanction, but he was arguing that defendants' affirmative defense of accord and satisfaction should fail as a matter of law and plaintiff was entitled to summary disposition on that ground. The trial court made no ruling on the record, but only stated that, if it denied plaintiff's motion for summary disposition, it would set and enforce the dates for further discovery. Then, in the court's written order, the trial court held that the Letter Agreement constitutes a binding contract, under which plaintiff fulfilled his obligations but defendants had not, and defendants' affirmative defense failed as a matter of law. Thus, the court having ruled in favor or plaintiff, there was no need for further discovery and the court did not contradict itself. However, because a court speaks through its written orders, *Rinas v Mercer*, 259 Mich App 63, 71; 672 NW2d 542 (2003), even if the trial court's statements at the hearing were contradictory, reversal would not be required.

Lastly, defendants claim that the trial court erred by allowing the substitution of an improper party to this lawsuit because plaintiff never presented any evidence that the Letter Agreement was in fact transferred to the Frank McCalla Trust or that Darold McCalla is actually the successor trustee. We find that this argument is not properly preserved for appeal.

Although defendants contested the substitution of Darold McCalla as plaintiff at the trial court, they did so on the grounds that, because the Frank McCalla Trust was the real party in interest, Frank McCalla was never a proper party and his son, therefore, could not be substituted for him. Defendants never argued below that the Frank McCalla Trust was in any way invalid, that the Letter Agreement was not an asset of the trust, or that Darold McCalla was not a successor trustee. In fact, defendants' argument to the trial court that the Frank McCalla Trust was the proper party impliedly admits that the trust is valid and that the Letter Agreement is among its assets. Defendants, therefore, failed to preserve this issue because they failed to raise it in the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). We

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[1] Although defendants argue that "the record shows disputed evidence that the Defendants had availed themselves to disposition on October 18, 2005 [sic?]," defendants provided no record citation for the evidence that allegedly places this issue in dispute. This Court will not search the record for factual support for a claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004); see also MCR 7.212(C)(7).

will not address an issue neither raised nor decided by the trial court, on the basis that it is not properly preserved. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot